SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

No. 73-1737

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Appellant,
vs.
MICHIGAN NATIONAL CORPORATION,
et al,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY TO APPELLANT'S REPLY MEMORANDUM

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The Government in its Reply Memorandum dated October, 1974, asked this Court to avoid "confused and unnecessary proceedings" by vacating the District Court's Order of Dismissal. The Government implies that the "confused and unnecessary proceedings" in this case are somehow the fault of Michigan National Corporation (MNC) and the other appellees. In truth, any confusion or unnecessary proceedings were caused by the Government's premature filing of this action and then its refusal to accept the District Court's ruling and the Appellees' Stipulation that the United States could refile the anti-

trust actions after the Comptroller of the Currency approved the acquisitions of the banks.

As the Court will recall, MNC proposed to acquire four banks. Under the relevant federal statutes, the acquisition plans required approval of the Federal Reserve Board and the Comptroller of the Currency. After the Federal Reserve Board approved the acquisition, but before the Comptroller acted, the Government commenced an antitrust action in the District Court to block the acquisition. The District Court dismissed the action as premature because the Comptroller had not yet acted. In opposing the dismissal the Government argued in the District Court that it was necessary to bring suit before the Comptroller acted because if the Government waited until after the Comptroller acted, a Court might later rule that the 30-day statute of limitations provided in the relevant statute commenced to run when the Federal Reserve Board acted. Thus, argued the Government, it might be forever precluded from testing the lawfulness of the acquisition in Court. In response to this fear, Michigan National Corporation and the other Defendants stipulated on the record that if the Government or the Court would dismiss this suit, the Defendants would not raise the 30-day statute of limitations as a defense if the action was recommenced after the Comptroller acted.[1] The District Court found the Defendants' position reasonable and ruled:

> "This Court is of the opinion that the position taken by the Defendants on the record fully protects the rights of the Government to proceed with the lawsuit if and when the Comptroller's approval is given and that this position makes it unnecessary to decide the merits of the question." *United States v. Michigan National Corporation*, et al. Opinion, February 19, 1974.

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[1] MNC has never abandoned this position. The motion to dismiss the second suit was not predicated upon the 30-day statute of limitations but rather upon the multiplicity of suits pending.

The Government refused to accept the Defendants' stipulation or the ruling of the District Court and appealed the dismissal to this Court.

Subsequently, the Comptroller approved the acquisition of two of the banks. The Government, apparently lacking the courage of its conviction that the first action was the proper action, started a new action in the District Court, under the statute MNC claimed was applicable, seeking to block the acquisition. The claims and the parties are the same in both the first and second actions.[2] Both actions are now pending, the first in this Court and the second in the District Court. If this Court rules in the Government's favor on the first case, it will be remanded to the District Court and there then will be two identical actions pending in the same court.

Thus, the "unnecessary and confusing" nature of these cases is not due to anything the Defendants have done, but rather is due to the Government's premature filing of the first action, its refusal to accept the District Court's and the Defendants' assurance that it could refile the action after the Comptroller's approval, and then its reversal

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[2] The parties are the same in both sets of actions except the Comptroller has acted on the acquisition of only two of the four banks and, therefore, only two of the "to be acquired banks" are named as Defendants in the second set of cases.

The Government may claim that this appeal should be decided by this Court to resolve once and for all the question of when the Government must commence suit in similar cases, i.e. within 30 days after approval by the Federal Reserve Board or within 30 days after approval by the Comptroller. However, if this appeal is dismissed as to the two banks which have received both approval from the Federal Reserve Board and the Comptroller, it will remain pending as to the two banks which have not yet received approval by the Comptroller. The Government can then obtain its needed guidance, if it is needed, in the remaining portion of the appeal. Or if all appeals are dismissed the Government will also receive the guidance it seeks.

of its original position by filing the second action after the Comptroller's approval.[3]

We assure this Court that we continue to hold to the appropriateness of the second suit as the proper vehicle to test the lawfulness of the acquisitions. We further assure this Court that if it will dismiss this appeal, we will withdraw our pending motion to dismiss the second case and we will not assert the 30-day statute of limitations in the second case.

Respectfully submitted,

EVERETT R. TREBILCOCK

RONALD R. PENTECOST

Attorneys for Appellees

October, 1974.

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[3] On September 9, 1974, at the District Court hearing on MNC's motion to dismiss the new District Court action, MNC's counsel again offered to withdraw the motion to dismiss if the Government would dismiss this appeal. The Government again refused to dismiss the appeal.